No. 12900

United States Court of Appeals

For the Ninth Circuit

J. ELROY MCCAW & JOHN D. KEATING, *Appellants,*

— VS. —

TORKEL WESTLY, THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

REPLY BRIEF OF APPELLANTS

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THE ARGUS PRESS, SEATTLE

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I.

The statement by Appellee on Page 8 of its brief that Appellants theorized "by letting their time for appeal expire, they (Appellants), excused themselves from resorting to territorial courts" is a double-edged accusation. Appellee's exhibits on Pages 61, 62, 65, and 68 of the transcript show a continuous correspondence was indulged in between Appellee and Appellants (who are *not* lawyers) anent the illegality of this radio tax law. This debate ran from February 1, 1948, to August 11, 1950 (Tr. 61). Appellants had no more duty to start a lawsuit than did Appellee. Appellant had a right to believe that Appellee would not attempt to enforce an illegal law against them, especially, since the Fishers Blend and KVL cases so decided. On August 11, 1950, the Attorney General of Hawaii rendered an opinion

upholding this law (Tr. 59), after "dillydallying" for more than two years, as to whether they would or would not enforce this law.

Therefore, Appellants had a right to believe from this "running correspondence" that no suit was necessary until after the Attorney General's opinion of August 11, 1950 (Tr. 59). The right of appeal had expired during this correspondence. Laymen (Appellants) were conducting this correspondence on behalf of Appellants, not lawyers. Should the Appellants now be deprived of federal jurisdiction simply because they were unwary and their time to appeal expired in the territorial court, because of correspondence conducted by both parties in good faith? Thus, Appellee's statement that Appellants theorize "By letting their time for appeal expire, they excused themselves from resorting to territorial courts," is as unfounded as would be an accusation by Appellants that Appellee trapped Appellants (laymen, not lawyers) into so doing. When the writer of this brief was employed in the case, he simply asked sixty more days to prepare a suit (in August, 1950) after more than two years had already gone by with correspondence about the law.

II.

Section 1575, Hawaiian Laws, cited on Page 11 of Appellee's brief which has to do with the subsequent suit filed by Appellant in the Territorial Court, whereby payment is made to the Territory under protest, must be interpreted in the light of later Sections 5535 and 5219, Hawaiian Laws, when it comes to the point of "paying back" the money paid under protest, there-

fore Section 1575 by itself is no remedy at all. (See Appellants' Brief, Page 10.) One can "pay" under Section 1575, but the remedy of "return" is governed by Sections 5535 and 5219, which are not remedies at all, but "snares."

III.

As a service to this court Appellants are incorporating as an Appendix to this Reply Brief the decision of the Territorial Circuit Court in the action initiated by these Appellants, under coercion, after the District Court of the U.S. refused to grant the relief prayed for in this action. Likewise attached is the more polished "decision" of the Attorney General of the Territory of Hawaii.

Both of these "decisions" fall into the same error, namely, their voluminous research for detail, with which to sustain their erroneous "decisions," overwhelmed simple consideration of the plain statutes of the United States, and patently ignored prior decisions of the Supreme Court of the United States dealing with this subject matter.

The strength of a radio signal, licensed by the Federal Communications Commission, has utterly no bearing whatsoever upon the question of whether or not radio is or is not intrinsically engaged in interstate commerce to the unconcern of a state or territory. And, there cannot be any unlicensed radio station, no matter its power rating, in the United States or its Territories. Section 301, USCA, Title 47, was glossed over and ignored. We quote it:

"Section 301. *License for radio communication or transmission of energy.*

"It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) *from one place in any Territory* or possession of the United States or in the District of Columbia *to another place in the same Territory,* possession, or District; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) *from any place in any State, Territory, or possession of the United States,* or in the District of Columbia, to any place in any foreign country or *to any vessel;* or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the

United States, except under and in accordance with this chapter and with a license in that behalf granted under the provisions of this chapter. (June 19, 1934, c. 652, Sec. 301, 48 Stat. 1081.)" (Italics ours.)

This court will note that Congress specifically included in the Communications Act an emmination "from one place in any territory (Honolulu where KPOA is situated) . . . to another place in the same territory" (another place in Honolulu). This court will likewise note that not only is this case covered by Subsection A above, but by Subsection C, which covers an emmination "from any place in any territory . . . *to any vessel.*"

Congress did not say whether the vessel was to be at sea or in the harbor at Honolulu, but only "to any vessel."

Therefore, the Appellee's concern about how far KPOA's emminations reach is specious as a matter of law. This court will judicially note from the exhibits and from its own knowledge of radio that even a taxicab radio emmination can be heard beyond the three-mile limit, and they also have to be licensed by the Federal Communications Commission. The Supreme Court as early as 1943 in the case of *National Broadcasting Company v. United States* (63 S.Ct. 997, 319 U.S. 190) closed all other points in this case against Appellee as a matter of law in the celebrated "chain broadcasting decision" when the Court rendered an extended opinion on radio and on its practical aspects:

"The plight into which radio fell prior to 1927 was attributable to certain basic facts about radio

as a means of communication—its facilities are limited; they are not available to all who may wish to use them; the radio spectrum simply is not large enough to accommodate everybody. There is a fixed natural limitation upon the number of stations that can operate without interfering with one another. Regulation of radio was therefore as vital to its development as traffic control was to the development of the automobile. In enacting the Radio Act of 1927, the first comprehensive scheme of control over radio communications, Congress acted upon the knowledge that if the potentialities of radio were not to be wasted, regulation was essential * * *

"As we noted in *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 137, 60 S.Ct. 437, 438, 84 L.ed. 656, 'In its essentials the Communications Act of 1934 (so far as its provisions relating to radio are concerned) derives from the Federal Radio Act of 1927 . . . By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, *formulated a unified and comprehensive regulatory system for the industry.* The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927 * * * '

"The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the

wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission * * *

"The Commission's licensing function cannot be discharged, therefore, merely by finding that there are no technological objections to the granting of a license. If the criterion of 'public interest' were limited to such matters, how could the Commission choose between two applicants for the same facilities, each of whom is financially and technically qualified to operate a station? Since the very inception of federal regulation by radio, comparative considerations as to the services to be rendered have governed the application of the standard of 'public interest, convenience, or necessity.' See *Federal Communications Commission v. Pottsville Broadcasting Co.,* 309 U.S. 134, 138 n. 2, 60 S.Ct. 437, 439, 84 L.ed. 656.

"The avowed aim of the Communications Act of 1934 was to secure the maximum benefits of radio to all the people of the United States. To that end Congress endowed the Communications Commission with comprehensive powers to promote and realize the vast potentialities of radio * * *

"These provisions, individually and in the aggregate, preclude the notion that the Commission is empowered to deal only with technical and engineering impediments to the 'larger and more effective use of radio in the public interest.' We

cannot find in the Act any such restriction of the Commission's authority. *Suppose, for example, that a community can, because of physical limitations, be assigned only two stations. That community might be deprived of effective service in any one of several ways. More powerful stations in nearby cities might blanket out the signals of the local stations so that they could not be heard at all. The stations might interfere with each other so that neither could be clearly heard. One station might dominate the other with the power of its signal. But the community could be deprived of good radio service in ways less crude. One man, financially and technically qualified, might apply for and obtain the licenses of both stations and present a single service over the two stations, thus wasting a frequency otherwise available to the area.* The language of the Act does not withdraw such a situation from the licensing and regulatory powers of the Commission, and there is no evidence that Congress did not mean its broad language to carry the authority it expresses.

"A procedural point calls for just a word. The District Court, by granting the Government's motion for summary judgment, disposed of the case upon the pleadings and upon the record made before the Commission. The court below correctly held that its inquiry was limited to review of the evidence before the Commission. Trial *de novo* of the matters heard by the Commission and dealt with in its Report would have been improper. See *Tagg Bros. v. United States,* 280 U.S. 420, 50 S.Ct. 220, 74 L.ed. 524; *Acker v. United States,* 298 U.S. 426, 56 S.Ct. 824, 80 L.ed. 1257." (Italics ours.)

Thus, the U.S. Supreme Court pointed out "several ways" in which the strength of Appellants' signal

would be immaterial as to whether it is solely engaged in interstate commerce to the exclusion of a state's concern. A small powered station in Honolulu could be "blanketed out" by "more powerful stations" or "the stations might interfere with each other," the Supreme Court said, illustrating the need for a uniform and national scheme for the regulation of radio — and also, since — low powered stations could be destroyed by larger ones miles away, illustrates that the rated power of a station does not make it less amenable to the sensitive scheme Congress created for its regulation.

IV.

This court in the case of *Anderson v. Mullaney,* 191 F.2d 123, defined the elements of interstate commerce in the fishing industry, particularly as concerns "the local activity inherent in any form of interstate commerce." As this court said in that case, "there are always convenient local incidents in every interstate operation." Any local activity of Appellants, from writing copy, soliciting advertising, fixing and adjusting its transmitter and equipment, employment of licensed operators (By the FCC), its location of its studios, are all associated and assembled for the single and sole purpose of effectuating Appellants' final act of its commerce—the projection of a radio signal into space—and thus into interstate and even international commerce. That is the final act of radio broadcasting, namely, the projection of its radio signal into space and beyond recall to unknown receivers, even "from one place in any territory to another place in the same territory" (A of Section 301, *supra*) *or* "from any

place in any territory—to any vessel'' (C of Section 301, *supra*), or to other points around the world.

Section 303, Title 47, USCA, from Subsections A to Q, respectively, show the extent and sensitivity of the pre-emption by Congress of the radio field. The sensitivity of the regulation is the test of whether a subject matter has been pre-empted.

Appellants also refer this court to Section 153, Title 47, USCA, Subsection B as follows:

> ''Section 153. Definitions.
>
> ''For the purposes of this chapter, unless the context otherwise requires—
>
> ''(a) 'Wire communication' or 'communication by wire' means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.
>
> ''(b) 'Radio communication' or 'communication by radio' means the transmission by radio of writing, signs, signals, pictures, and sounds of all kinds, including all *instrumentalities, facilities,* apparatus, *and services* (among other things, the receipt, forwarding, and delivery of communications) *incidental* to such transmission. (Italics ours.)
>
> ''(d) 'Transmission of energy by radio' or '*radio transmission of energy*' includes both such transmission and all instrumentalities, facilities, *and services incidental* to such transmission.
>
> ''(k) 'Radio station' or 'station' means a station

> equipped to engage in radio communication or *radio transmission of energy.*" (Italics ours.)

Thus, all local "services," or "local activities" or "incidentals," or "instrumentalities," of any kind by a radio station is included within the "Definitions" of the Communications Act.

As stated in *Dumont Lab. v. Carroll,* 86 F. Supp. 813 (page 61, Appellants' Brief) "the field of radio broadcasting has been pre-empted by Congress."

The *Alaska Fishing* case, *supra,* decided by this court and affirmed by the Supreme Court in the 72 S.Ct. 48, affirms the principle that a tax cannot be sustained by simply "tying it to a local incident."

V.

Appellee's argument that this action should be dismissed, or held up pending the arrival of the local suit into which Appellants were coerced, runs counter to one of Justice Frankfurter's statements in 72 S.Ct. 430, in the case of *Mullaney v. Anderson* wherein the court stated:

> "To dismiss the petition and require the Plaintiffs to start over in the District Court would entail needless waste and run counter to effective judicial administration * * * "

The complaint in the subsequent local suit, into which Appellants were coerced, is admitted by Appellees on Page 5 of their brief to be identical with the one at bar. Appellee said:

> "When that case reaches this court the record will show that the complaint in the territorial court is practically the same as the complaint in the court below" (in this case).

It is identical with the complaint in this cause of action. The issues are the same; the parties are the same. No new matter is involved. It is a needless waste of time and expense to await the mere satisfaction of a doubtful form of procedure which does not apply to this case anyway, to be satisfied before justice can be obtained in the cause at bar. This court has the right to do substantial justice to the parties in the present hearing even though unresolved problems of first instance are involved. It was not Appellants' fault that the problems were not resolved. Appellate courts not only correct lower courts but in the interest of effective judicial administration, they render effective judgments.

In the case of *Guardian Life Insurance Company v. Kortz,* 151 F.(2d) 582, it was held that the pendency of actions by the insured in a state court to recover unpaid disability benefits did not give that court exclusive jurisdiction of the subject matter of actions for declaratory judgments instituted by the insurer in a Federal District Court, in which actions the insurer sought to be relieved of both past and future liability for disability benefits. The court stated:

> "It is well settled that where two actions involving the same cause of action are pending in a state and a federal court, and are within the concurrent jurisdiction of each, both actions, in so far as they seek relief in personam, may proceed at the same time and when one action has gone to final judgment, that judgment may be set up as a bar in the other action under the doctrine of *res judicata.*"
>
> "Counsel for Kortz assert that the Insurance Company can present the issues raised by the com-

plaints for declaratory judgments by cross-petitions in the state court actions. On the other hand, counsel for the Insurance Company asserts that as the issues are framed in the state court the cases may be disposed of upon the issue of disability without a determination of the issues raised by the complaints for declaratory judgments; that there can be no substantial dispute as to the facts in the actions for declaratory judgments; and that the issue of law presented therein can be more expeditiously and inexpensively determined in such actions."

"It is the duty of the federal court, in exercising its jurisdiction under Sec. 274d, *supra,* to ascertain whether the questions in controversy between the parties to the federal court suit can better be settled in the proceedings pending in the state court."

"The question should be resolved by a determination of whether there is such a plain, adequate, and speedy remedy afforded the Insurance Company in the pending state court actions that a declaratory judgment will serve no useful purpose."

"The fact that questions of state law are presented will not, in the absence of exceptional circumstances, justify a refusal to entertain an action for a declaratory judgment. In *Meredith v. Winter Haven,* 320 U.S. 228, 234; 64 S.Ct. 7, 11; 88 L.Ed. 9, the court said:

"The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of

some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment."

"An action for a declaratory judgment, if otherwise appropriate, should not be dismissed merely on the ground that another remedy is available, nor because of the pendency of another suit, if the issues in the declaratory judgment actions will not necessarily be determined in that suit."

"Rule 57 of the Federal Rules of Civil Procedure for the District Courts of the United States, 28 USCA, following section 723c, in part, provides:

"The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

The foregoing case has been followed by *Skelly Oil v. Phillips Petroleum,* 174 F.(2d) 89, where a Federal Act was involved.

Those cases holding to the contrary are where no federal statute is involved as in this case.

State laws are not controlling in determining what the incidents of federal rights shall be.

An interpretation by a Federal Court of a right or immunity created by a law of the United States (Title 47, USCA) is an essential element in this cause of action. If the Communications Act has foreclosed the

rights of states to legislate on this subject matter, then a declaration by a Federal Court should issue to that effect. The court below admitted a more "speedy" remedy existed in Federal Court (Tr. 313). That, with the jurisdictional elements obtaining, was controlling.

In the case of *Dice v. Akron,* 72 S.Ct. 312, the Supreme Court stated:

> "First. We agree with the Court of Appeals of Summit County, Ohio, and the dissenting judge in the Ohio Supreme Court and hold that validity of releases under the Federal Employers' Liability Act *raises a federal question to be determined by federal rather than state law.* Congress in Section 51 of the Act granted petitioner a right to recover against his employer for damages negligently inflicted. State laws are not controlling in determining what the incidents of this federal right shall be. *Chesapeake & Ohio R. Co. v. Kuhn,* 284 U.S. 44, 52 S.Ct. 45, 76 L.ed. 157; *Ricketts v. Pennsylvania R. Co.* (2 Cir.) 153 F.(2d) 757, 759, 164 A.L.R. 387. Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. Moreover, only if federal law controls can the federal Acts be given that uniform application throughout the country essential to effectuate its purposes. See *Garrett v. Moore-McCormack Co.,* 317 U.S. 239, 244, 63 S.Ct. 246, 250, 87 L.ed. 239, and cases there cited. Releases and other devices designed to liquidate or defeat injured employees' claims play an important part in the federal Act's administration. Compare *Duncan v. Thompson,* 315 U.S. 1, 61 S.Ct.

422, 86 L.ed. 575. Their validity is but one of the many interrelated questions that must constantly be determined in these cases according to a uniform federal law" (Italics ours).

These cases illustrate that the States and Territories cannot do *directly* what the Territory (Appellee) is trying to do *indirectly* in this case, namely: interpret the extent of appellant's "right" or "immunity" under a Federal law. Appellants are entitled to a Federal Court interpretation of their Federal rights.

Again the Supreme Court stated in *First National Bank of Chicago v. United Airlines,* 72 S.Ct. 421,

> "Whether or not Illinois may validly close her own courts to litigation of this kind, Illinois most assuredly cannot prescribe the subject matter jurisdiction of federal courts even when they sit in that State. Congress already has done this, 28 U.S.C. Sec. 1332(a) (1), 28 U.S.C.A. Sec. 1332 (a) (1), and state law is powerless to enlarge, vary, or limit this requirement. The parties to this case have showed the diversity of citizenship and amount in controversy required by Congress, and therefore the federal court, *by virtue of the law of its own being,* has jurisdiction of their action.
>
> "The suggestion that *Erie R. Co. v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188, and its progeny diminish the jurisdiction of a federal court sitting in a diversity case by assimilating any limitation that the state may impose on her own courts seems to confuse the law of jurisdiction with substantive law.
>
> "It is indeed fanciful to suggest that a state statute relating to the power of its own courts is an applicable 'rule of decision' under this statute,

when Congress in passing the federal jurisdictional grant has specifically 'otherwise required and provided.' 28 U.S.C. Sec. 1332(a) (1), 28 U.S.C.A. Sec. 1332(a) (1), 28 U.S.C.A. Sec. 1332 (a) (1). The petitioner enters the federal court not by the grace of the laws of Illinois but by the grace of the laws of the United States." (Italics ours.)

In the case of *Memphis Steam Laundry Cleaner, Inc. v. Stone,* 72 S.Ct. 424, the court said:

"In passing upon the validity of a state tax challenged under the Commerce Clause, we first look to the 'operating incidence' of the tax. The Mississippi Act requires a 'privilege license' and imposes a 'privilege tax' upon appellant's employees 'soliciting business.' The Mississippi Supreme Court described the tax as follows: 'The tax involved here is not a tax on interstate business for a laundry not licensed in this state, a local activity which applies to residents and non-residents alike."

"The State may determine for itself the operating incidence of its tax. But it is for this court to determine whether the tax, as construed by the highest court of the State, is or is not 'a tax on interstate commerce'."

In the case of *Mott v. City of Flora,* 3 F.R.D. 233 (234), on a motion to dismiss a complaint on the grounds that the remedy lay in the state courts the Federal court said,

"As was pointed out at the pre-trial hearing, if the court must refuse to take this case, it would, if consistent, *be compelled to refuse all cases in which the constitutionality of a state statute is in anywise brought in question unless the constitutionality of*

that particular statute had been passed upon and authoritatively settled by the state courts. It would not appear that it was the purpose of the United States Supreme Court, in the decisions relied upon by the defendant, to go to this length in limiting the jurisdiction or the discretion of the district courts.'' (Italics ours.)

The ruling in this case was followed in the case of *City of Birmingham v. Monk,* 185 F.2d 859.

In the recent case of *Redditt v. Hale,* 184 F.2d 443 (CCA, Ill.) the court held:

''THOMAS, Circuit Judge.

''This is an appeal by plaintiffs from an order sustaining a motion of defendants to dismiss the complaint for want of jurisdiction. Jurisdiction was predicated upon diversity of citizenship and a demand for judgment in the amount of $142,200.

''The motion to dismiss alleges want of jurisdiction on the ground 'that the subject matter of this litigation is now in the jurisdiction of the Probate Court of Crittenden County, Arkansas.'

''(1) that the cause of action alleged in the complaint is exclusively within the jurisdiction of the probate court of Crittenden County, Arkansas, and (2) that this suit is barred because there is 'another action pending' in the probate court of Crittenden County, Arkansas, involving the same parties and the same cause of action. * * *''

''* * * 'the pendency in a state court of an action brought by the plaintiff in a subsequent action between the same parties in the federal court, and which involves the same subject matter, presents no bar and furnishes no ground for the abatement of the later action.''

CONCLUSION

The court below admitted that a more speedy remedy existed is the U.S. District Court (Tr. 313). Even if the Johnson Act applied, which it does not, just any kind of a remedy in a state, let alone a territory, does not make it applicable unless the remedy could be said to be an efficient one. The lower court admitted the remedy in the Federal Court was more speedy, and thus more efficient. All the essential elements of jurisdiction were present (Tr. 467). There was a conflict between high federal and state courts on a point of law involving a right or immunity arising out of a federal law to appellants. Judicial discretion cannot be unfettered. As a matter of law, and in view of the many U.S. Supreme Court's decisions on the sensitivity of the regulations of the Federal Communications Act, summary judgment, especially *where both parties asked for the same,* could have disposed of this matter—one way or the other.

The Territory has had its day in a Territorial court (see Appendix). Nothing new was added to the pleadings of the Appellants in the Territorial court from what was advanced in the U. S. Court. The Appellee had a specious "field day," so to speak, on its single immaterial point, namely, "How far can Appellants' signal be heard?" As a matter of law, Radio cannot be "half free" and "half taxed." It's "all or none." Otherwise, chaos would again result instead of effective regulation.

An examination of the Appendix herein will show that a deferment of decisive action in this case will

again merely extend the argument more extensively into one of an immaterial and specious nature, namely, "How far can Appellant's signal be heard?" That argument has utterly no moment in this case in view of the statute expressly including Appellant's business, even though its signal can be heard only "within the Territory" or by "any vessel."

A deferment of this action until the local Territorial case comes up to this court will likewise merely add to Appellants' woes and put off until another day, so to speak, a question that will inevitably have to be answered, namely, is the tax law good or bad?

Respectfully submitted,

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APPENDIX I.

Law No. 21340

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

AT TERM **IN LAW**

J. ELROY MCCAW and JOHN D. KEATING, *Complainants,*

v.

THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, TORKEL WESTLY, *Defendant.*

No. 21340

ACTION TO RECOVER EXCISE TAXES PAID UNDER PROTEST

DECISION

(The Clerk called the case at 11:00 a.m.)

THE CLERK: For decision.

THE COURT: Gentlemen, this is an action by the complainants, McCaw and Keating, to recover gross income taxes levied against their receipts or a portion of their receipts from broadcasting, receipts which were paid under protest, together with some interest and penalties.

The Territory, in responding to the action, has in addition to denying the allegations of the complaint have cross-complained for the amount which was alleged to be due in addition to the amount herein sued for.

The complainants operate a broadcasting station here in the City of Honolulu, commonly known as Station KPOA, on a wave band of 630 kilocycles with 5,-

000 watts of power. The business in which they are engaged is one which is controlled and regulated in a very great degree by the Federal Communications Commission. It is the contention of the complainants that because of the preemption of this field of endeavor by the Federal Communications Commission that any state or territory, and of course in this case, the Territory of Hawaii, has not the right or the power to impose this tax as the regulation of such a business has been preempted and therefore that they are precluded.

Now, the Federal Communications Commission has defined what is an interstate communication. That is Section 3 of the Communications Act of 1934, it being subsection (e), which says, "An interstate communication or transmission means a communication or transmission from any state or territory," and then, leaving out the various things that are not important, "to any other state or territory." And, of course, there has to be a license for any radio station, as provided by Section 301 of the Act, where there is any apparatus operated for the transmission of energy or communication by signals, by radio, from one place in any territory to another place in the same territory or within states or between a state and a foreign country, and things of that kind. So, that particular section just quoted really means that it takes in all forms of radio communication, no matter what they are, whether they be transmission between states or between a station and points right here in Honolulu, or between taxicabs or any sort of a communication of that kind. The only thing that I understand is excluded from the Act is the governmental transmission.

It has been held in a number of cases upon which the complainants assert their position that radio broadcasting by the very nature of that industry, or whatever we may term it, is in the field of interstate commerce for the reason that once the radio impulse or waves, or whatever you want to call them, are put in motion by broadcasting apparatus that there is no longer any control over the transmission of that signal. And, of course, on the mainland, where state boundaries are very close, it is impossible to say in many instances that it is not interstate commerce. Examples have been referred to, such as a radio station in Spokane or Coeur d'Alene, a radio station in El Paso, near the Mexican border, a radio station at Yuma, between California and the Arizona border, and you could make any number of such examples.

It is further contended by the complainants that this tax is a burden upon interstate commerce, in which this radio is engaged, and therefore an undue interference with interstate commerce, and therefore that the tax is void.

It is contended, on the other hand, by the Territory that KPOA, when we start to analyze its business and the field in which or the area in which it is involved, that we can go to the licensing and the regulations of the Federal Communications Commission and to a great extent find our answer.

Now, KPOA, it has been testified, is without question a station of the 3-A class of radio stations. Such a station is one which operates with power of not less than one kilowatt nor more than five kilowatts and the

service area of which is subject to interference in accordance with the engineering standards of allocation. And then, Section 3.30 of the Communications Act provides that such station, "Each standard broadcasting station will be licensed to serve primarily a particular city, town, or other political subdivision, which will be specified in the station's license, and the station will be considered as located in that place." And subsection (c) of that, "The transmitter of each standard broadcast station shall be so located that the primary service is delivered to the borough or city in which the main studio is located, in accordance with the standards of good engineering practice."

There must be in ordinary broadcasting three service areas. They have been defined by the Federal Communications Commission as follows: "The term 'primary service area of a broadcasting station' means the area in which the ground wave is not subject to objectionable interference or objectionable fading." Under that particular classification it has been testified in this case that during the daytime hours KPOA does its broadcasting by the means of the ground wave and that this ground wave reaches the entire group of the Hawaiian Islands, with two exceptions. However, we may say two major exceptions. One is an area on the northern part of Kauai, just back of the mountains that we know as Kokee, or the Canyon; the other is that area south of the high mountains on the Island of Hawaii and includes the city of Hilo. And it might be well to note at this particular place that this station, as well as another broadcasting station located here in Hono-

lulu, each has a subsidiary or connected station located in the city of Hilo. The secondary area of a broadcasting station means the area served by the sky wave and not subject to objectionable interference. The signal is subject to intermittent variations in intensity.

It has been testified in this case that at night the signals by the radio broadcasting are sent out to a great extent through a sky wave or sky waves and at night these sky waves, as the Court understands them, goes up a ways and hits something, bounces back and hits the earth or water and then back again, and these going back and forth reach out and under certain phenomena can be heard in almost any place on earth.

But the question for this Court to decide in that particular category is, what is the area in which the sky waves are of such intensity and are capable of being, we may say, pleasurably heard by a listening audience — we may put it this way — to be of commercial value to a radio station that is in business with the exception of 30% of its time which may be allotted to programs from which he can, if he can find sponsors, get remuneration for the operation of that station.

There is a third area of service and it is defined as the area, the intermittent service area of a broadcasting station, means the area serviced from the ground wave but beyond the primary service area, subject to some interference or fading.

There have been a lot of technical terms used here. I hope I don't make a mistake in the use of them, but this Court, hearing this case, of course this Court has the first chance of making the mistake, if I do make the

mistake. I don't feel that I am too much to be blamed because this is something I never heard of before in my life. It seems to me, as I understand the ground wave, that there is .5, approximately .5 of a microvolt per meter is the area, or something of that kind, wherein there is supposed to be proper listening, and you go on from there out until you get less and less. I think I had that down here some place, but the attorneys know what I mean anyway; they understand what I am talking about.

In this case there have been letters, what they call D-X letters, that have been received. These letters fall in the category, as I understand it, of people that have a hobby to a great extent of listening to stations and picking up signals, and a lot of them have a regular form letter that they send in, and one of the things they seem to be interested in is to get an acknowledgment to put in their albums or collection, or whatever it is. So that these D-Xer letters have come from a great many places. I believe, if my memory serves me correctly, there was one received from some place in Massachusetts, there was one received from some place in Australia, a number from New Zealand, Samoa, and various places in the Pacific, and of course a number of other places on the mainland. It is my recollection also that this reception or hearing of this station were all received via the route of the sky wave as contradistinguished from the ground wave. There is an exception of one instance, in which there was some testimony that on the battleship Iowa, I think it was, that somebody heard a ground wave on one of the radio receiving stations on board that vessel, some 1,500 miles

out to sea. One of the engineers, the engineer for the Territory, said it was possible but it was an exception, that generally speaking the volume of the ground wave at that distance in the daytime was, as I understood what they were endeavoring to state, that when the ground wave gets down so it is weak enough, then it is drowned out and it doesn't become listenable because of ground noises.

So that this Court, after listening to this evidence, and in its ordinary, simple terms, I am not endeavoring to get into the field or to use the language of the gentlemen who have been on the stand because I would just get myself tied up in knots, I believe that the evidence here shows that the ground waves certainly, or the daytime broadcast is incapable, so far as any commercial value for constant listening, is confined to the Hawaiian Islands; that the sky wave at night for commercial purposes, I believe, is also limited to the Hawaiian Islands. That is, for dependability.

Now, it seems that in radio that the hours of the day, the seasons of the year, vary, the ability to receive these broadcast signals so that at certain seasons of the year signals can be very plainly heard in Alaska, certain seasons of the year they can be heard south, and if the channel through which they travel is in darkness, then that aids in its reception.

There has been introduced into evidence a great many articles from magazines, advertising radio coverage, also brochures, so-called, that this station and other stations here in the Territory have put out, I understand for the purpose of advising their prospective

sponsors or persons buying radio time, that the map or chart, to a great extent, exhibited or attached to such an article, is the coverage or the area that the radio selling the time is covered. In each of those instances here in Hawaii, they have not gone beyond the Territorial limits of the Territory of Hawaii, that is, for local broadcasting. I am talking about the ordinary broadcaster's band and not the short-wave band.

There has been testimony that in one instance a gentleman from Samoa, who I understand is now in Durance Vile, purchased some time to broadcast a program to Samoa, and it was broadcast, as I recall the testimony, at an hour in the wintertime, in December, as I recall, when the sky wave would be used at night to deliver the program to Samoa.

There is evidence in this case that a request has been made of these complainants to produce any sponsor who has purchased commercial time on their broadcasts with an end in view of sending advertising to any radio audience other than that located within the Territory of Hawaii; that there has been no showing of any such thing, with the exception of this one Samoan program, if you can call that one.

Now. we come down to reality—what does this broadcast company make its money out of? With the exception of short-wave relays such as baseball games, fights, football games, various programs such as Hawaii Calls, and that sort of thing, which is either sent or received by short-wave to or from the mainland, as the case may be, their broadcasting, in the Court's mind, is confined to the Territory of Hawaii and they make their money

with Hawaiian audiences in view and not the audience outside the Territory.

Let's go into these various cases, or let's say these various lines of cases that have been ably argued before the Court. We take first the stevedoring cases. There have been attempts in various courts of the United States to tax stevedoring companies on the receipts that they have made from loading and unloading steamships. It has been apparently uniformly held that that is an interference with interstate commerce, the reasoning being that when you put cargo on a vessel it is going either to a foreign port or to another state, and they have held that the interstate transportation of that cargo starts when the sling or when you put the cargo in the sling to put it on the ship and it is not completed until it is taken off the sling and put on the dock at its destination.

Now, another line of cases is the railroad cases. We have a great many trans-continental railroads and many of them that involve a number of states. It seems to be the universal holding that a railroad system is so intricate in its nature that you cannot tax it because you cannot segregate the services, so that it is more or less custom, and of course, we have our steamship fares, our airplane fares, and things of that kind, which are within interstate commerce.

There has also been brought to the attention of this Court a number of cases, what they commonly call trucking cases, and where it has been shown that the trucking was solely of an interstate nature, then the states have been prohibited from interfering with that

or with taxing its proceeds. However, it has been held in one case of a belt-line railroad, where it picks up freight cars from freight yards of various railroads and takes them to the docks in a city, that is where it is wholly within the city area, and that is the only business of the belt railroad, that that is intra-state commerce and subject to taxation.

If this station were so situated that the reception of its programs in another state or territory was sufficiently constant so as to be of commercial value, this Court would without hesitation find that this was an interstate enterprise.

There have been a number of cases which Mr. Davis, able counsel for the stations, has brought to the Court's attention, particularly in the State of Washington, the leading case being what has been referred to here as the *Fisher's Blend* case. That case went to the Supreme Court of the United States and Mr. Justice Stone, I believe, made a finding that the radio field was interstate in its nature. But in that particular case the facts which were furnished the court, there was a stipulated set of facts that went to the Supreme Court, upon which we must consider is the basis of their decision, and it was that this station was engaged in broadcasting on a clear channel, not only interstate but international, and that it received money for that sort of broadcasting. So that, under the stipulated facts the Court could make no other finding. Then there are other Washington cases of a similar nature that have found to the same effect.

There is a case that has been referred to as the Albu-

querque case, where the station was located in Albuquerque and a tax of this kind was sustained down there on the basis that that station only served a particular area and that particular area was within the state, and they excepted, if my memory serves me right, any programs over that station that were broadcast through a media coming from outside the state, or in that particular case, where they have a chain of broadcasting stations, the station was sending a program from that station to other stations.

Now, here, I believe that our situation is different than it is upon the mainland. It is 2,500 land miles approximately from here to the Pacific Coast. I do not believe, with a station of this kind, that it could or has engaged, with reference to its ordinary broadcasting band, and I am not talking about short-wave relay, in interstate commerce in that regard.

The complainants have not shown to this Court that this gross income tax of 2%, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station that would interfere with its operation. It does not lie in the same category as the Colorado Railroad case, wherein the short-line railroad or the railroad made a contract with the state to operate a short line within the state, and the Federal people said that that contract was no good because it would be a drain and a hindrance to the operation of the main railroad in interstate commerce.

Now, gentlemen, in general that is what the Court has found. Of course, there are these foreign programs, these foreign language programs, operating and they sold time on those.

The Court has gone over the proposed findings of fact that have been submitted here by Miss Lewis. I think I have covered them considerably, but in order that there can be no mistake, I think that those proposed findings of fact meet with the Court's approval, and if the Court has overlooked any of them in its oral decision they may be incorporated in the final decision as part of the Court's findings.

And the Court finds, in essence then, in favor of the Territory and against the complainants for the reasons here stated.

The prevailing party will submit a form of decision in conformity with the findings of the Court herein announced and may incorporate the oral decision of the Court by reference as it is reflected in the reporter's notes taken at this time.

The Court at this time wishes to thank both sides in this case for an able presentation of the case. I do not purport to be omnipotent. All I can say is, that another gentleman has said, a gentleman from the State of Washington, the Honorable Jeremiah Nederer, that I happen to be the judge to have the first opportunity to make a mistake.

All right, gentlemen. You may have your exception.

Mr. Ingman: We except to your Honor's ruling on the ground it is contrary to the law and the evidence and give notice of a motion for new trial and notice of an appeal.

And there is one exhibit here, your Honor, that we now have and we would like to substitute.

APPENDIX II.

Law No. 21340

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, TERRITORY OF HAWAII

AT TERM **IN LAW**

J. ELROY MCCAW and JOHN D. KEATING, *Complainants,*

v.

THE TAX COMMISSIONER OF THE TERRITORY OF HAWAII, TORKEL WESTLY, *Defendant.*

No. 21340

ACTION TO RECOVER EXCISE TAXES PAID UNDER PROTEST

Filed in open court at 2:15 o'clock p.m., Jan. 28, 1952
R. A. Lynn, Clerk.

RHODA V. LEWIS, ESQ.
Deputy Attorney General
Territory of Hawaii
Attorney for the Tax Commissioner

DECISION

This is an action by the complainants, J. Elroy McCaw and John D. Keating, to recover gross income taxes paid under protest, together with some interest and penalties. The tax law involved is chapter 101 of the Revised Laws of Hawaii 1945, as amended.

Complainants are a co-partnership, registered as such under the laws of the Territory of Hawaii, and they hold under said chapter 101 a license to engage in business; this license has been renewed annually to and including the year 1951. (Pursuant to section 5451.01, as amended, renewal for 1952 may be on or before January 31, 1952.)

The tax assessments concerned in this case involve the period to and including July 31, 1950. Complainants paid under protest part of the taxes demanded by the Tax Commissioner for this period. The Tax Commissioner, defendant herein, in addition to denying the allegations of the complaint, cross-complained for the balance of the taxes assessed by him for this period, together with penalties and interest. An oral motion to dismiss this counterclaim was made on January 14, 1952, and was denied on the ground that section 10476 of the Revised Laws of Hawaii 1945 is applicable.

The taxes involved in this case were levied against broadcast receipts of the aforesaid period. During this period complainants operated, and now operate, a radio broadcast station on a frequency of 630 kilocycles with 5000 watts of power. This station operates under the call letters KPOA, and commonly is so known. Complainants also operate, in connection with KPOA, a station in Hilo, but the Hilo station commenced operations subsequent to the period involved in the aforesaid assessments.

The business in which complainants are engaged is one which is controlled and regulated in a very great degree by the Federal Communications Commission under the Communications Act of 1934, Title 47, chapter 5, United States Code. It is the contention of the complainants that this field of endeavor has been preempted by the federal government to the exclusion of any state or territorial tax. It further is contended by the complainants that this radio station is engaged in interstate commerce, and that the territorial tax is a

burden upon interstate commerce and an undue interference therewith, and therefore void.

The Tax Commissioner, on behalf of the Territory, asserts that the federal statute and regulations embrace more than interstate communication (and from sections 3(e) and 301 of the Communications Act of 1934, 47 U.S.C. 153(e) and 301, this appears to be so); that the breadth of the field of regulation under the Communications Act of 1934 does not indicate that the states and the territories are excluded from all taxes in this wide field; that the pertinent question here is the extent to which KPOA is engaged in interstate communication and whether the taxed receipts are derived from interstate communication; that the facts show that the sole source of the taxed receipts is the transmission of KPOA broadcasts to the radio audience in the Territory, hence those receipts are from solely intrastate communication and may be taxed, and that no illegal burden on interstate commerce results from such a tax. The Tax Commissioner asserts the fact to be that KPOA's standard band broadcasts do not reach any radio audience outside the Territory with effective or satisfactory service that is of commercial significance, that only the receipts from short-wave relays are from interstate communication and those have not been taxed.

After trial of the case commencing January 3 to and including January 11, 1952, study of the memoranda which the parties submitted at the inception of the trial and authorities cited, and oral argument on January 14, 1952, the Court on January 15, 1952, rendered

its oral decision upholding the contentions of the Tax Commissioner; said oral decision, as reflected in the official reporter's notes, is incorporated herein by reference.

It has been held in a number of cases, upon which the complainants rely, that radio broadcasting, by its very nature, is interstate commerce for the reason that once the radio impulses or waves are put in motion there is no control over the extent of their transmission. But the pertinent question is: What is the area in which the KPOA broadcasts have commercial value? Save for 30% of its time which, under F.C.C. requirements, must be used for sustaining programs, the station may and does seek remuneration from sponsors of commercial programs and the like. So what we come down to is: What does this broadcast company make its money out of? The Court has concluded that, with the exception of the short-wave relays, KPOA makes its money with the Hawaiian audience in view and not the audience outside the Territory. As a result the receipts from these broadcasts may be taxed.

The receipts from railroads have been held taxable where obtained from the transportation of freight picked up at a point within the state and delivered to another point in the same state. In the case of a transcontinental railroad system the transcontinental hauls are tax exempt, but not the local business, although a railroad system is intricate in its nature. (See *Pacific Telephone and Telegraph Co. v. Tax Commissioner,* 297 U.S. 403.) So with the trucking business, it is where the trucking is solely of an interstate nature that the

states have been prohibited from taxing the proceeds. As to stevedoring, it has been held that when the cargo is put in the sling to put it on the ship that is the start of the interstate transportation and for that reason to tax the stevedoring receipts is an interference with interstate commerce.

Here as already stated the tax is on intrastate communication, and the complainants have not shown to this Court that this 2½% gross income tax, which everybody in the Territory pays, not only the radio stations but everybody else, is such a burden upon this station as to interfere with its operation. What complainants would have had to show can be ascertained by considering the Colorado Railroad case (271 U.S. 153), which was explained and held inapplicable in certain tax cases that were decided in *Pacific Telephone and Telegraph Co. v. Tax Commissioner, supra,* 297 U. S. 403.

The leading case as to radio broadcasting is the *Fisher's Blend* case (297 U.S. 650). In that particular case there was a stipulated set of facts that went to the Supreme Court, and which we must consider to be the basis of the decision. Under those facts the broadcasting there was not only interstate but international and the station received money for that sort of broadcasting. A radio station in Spokane, Washington, or Coeur d'Alene, Idaho, or El Paso, near the Mexican border, or Yuma, Arizona, near the California border, might be interstate. However, a station in Albuquerque, New Mexico, was held (51 N.M. 332 and 54 N.M. 133, 184 P. (2d) 416 and 215 P.(2d) 819) to have some broadcasts

that were directed only to a particular area within the state, though certain chain broadcasts and certain broadcasts of out-of-state media were held non-taxable.

If this station were so situated that the reception of its programs in another state or territory was sufficiently constant so as to be of commercial value, this Court without hesitation would find that this was an interstate enterprise. But it is situated in Honolulu, 2500 land miles from the Pacific coast. It is, under the regulations of the Federal Communications Commission (47 C.F.R. Chapter 1, Part 3) a Class III-A station, as set forth in Sec. 3.22 of the cited regulations (Exhibit 1). Attention also is called to section 3.30, paragraph (a), as to the place which a standard broadcast station is licensed to serve primarily, and paragraph (c) of the same section as to the location of the transmitter for the delivery of primary service to the place where the main studio is located. By the above cited regulations and the "Standards of Good Engineering Practice Concerning Standard Broadcast Stations" (Exhibits 1 and 2) the Federal Communications Commission has defined three service areas and has set standards for the determination of these service areas.

During the daytime hours KPOA does its broadcasting by means of the groundwave. The area in which the groundwave is not subject to objectionable interference or objectionable fading is, under the F.C.C. regulations and standards, above cited, the primary service area. A groundwave signal of half a millivolt per meter (.5 mv/m) generally will afford proper listening. KPOA has a groundwave signal of .5 mv/m or better through-

out the Hawaiian Islands, as shown on Exhibits 5a and 37, but with two major exceptions there shown. These exceptions are the northern part of Kauai, just back of the mountains that we know as Kokee, and the area (including the city of Hilo) south of the high mountains on the island of Hawaii. It is noteworthy that the evidence shows that KPOA has a connected station located in Hilo, and also shows another such instance in connection with another Hawaiian station.

Beyond the half-millivolt groundwave contour the possibilities of service by the groundwave depend on certain factors set forth in the F.C.C. standards, and as the signal grows less and less the question is whether the groundwave is rendering "intermittent service," the "intermittent service area" being defined by the F.C.C. as "the area receiving service from the groundwave but beyond the primary service area and subject to some interference and fading." Intermittent service depends upon a number of factors, but it is clear that when the groundwave signal is so weak it is drowned out by the noise level, that cannot be listenable. Upon all of the evidence (including the evidence as to reception on the battleship Iowa under the particular circumstances explained by the engineer called by the Territory) the Court has concluded that finding number 5, below set forth, is correct.

During hours of darkness a radio station can broadcast by the skywave. Under certain phenomena the skywave signal can be heard almost any place on earth. The area served by the skywave and not subject to objectionable interference is, by the F.C.C., called the

"secondary service area." Standards for "secondary service" are set forth by the F.C.C. in the "Standards of Good Engineering Practice" (Exhibit 2). It is not suggested that reception outside the Territory of the skywave signal of this Class III-A station meets those standards.

The evidence shows that reception of the skywave is not dependable, due to a number of factors. Letters received in evidence from persons reporting listening in distant places (commonly called "D-X" letters) have been considered. These were instances of reception outside the Territory by the skywave, but such reception outside the Territory is not sufficiently dependable for commercial purposes.

There have been introduced in evidence and the Court has considered advertisements of radio station coverage of stations in the continental United States and the Territory, including a brochure put out by this station. In no instance in the Territory has the advertised coverage gone beyond the territorial limits of the Territory of Hawaii.

There is evidence of a request made by the Tax Commissioner of the complainants to produce any sponsor who has purchased commercial time on KPOA with an end in view of sending advertising to any radio audience other than that located within the Territory of Hawaii. There has been no showing of any such purchase. A possible exception is the sale of radio time to Willie Saaga for a Samoan program (Exhibit L). The circumstances of this sale appear from the evidence. When the Tax Commissioner was preparing the assess-

ments no showing of this sale was made to him although KPOA was given an opportunity to make such showing; finding and conclusion number 10, below set forth, dispose of this matter.

There have been submitted by the Tax Commissioner proposed findings and conclusions, which include some of the matters above set forth and some additional matters. The Court finds and holds these to be in accordance with the law and the evidence; they are as follows:

1. In so far as places outside the Territory of Hawaii are concerned, KPOA's broadcasts on its standard band do not afford effective or satisfactory service that measures up to the standards for commercial coverage.

2. Time buyers do not buy time on KPOA as a medium of communication to an out-of-the-Territory audience.

3. Where a KPOA broadcast is directed to an out-of-the-Territory audience a shortwave relay is used, as in the case of the program "Hawaii Calls."

4. The tax has not been assessed on any receipts from broadcasts carried out of the Territory by shortwave relay or brought into the Territory by shortwave relay.

5. During daylight hours enjoyable listening to the KPOA standard band broadcasts is impossible at places outside the Territory, and is limited to ships or planes that happen to be within range.

6. During hours of darkness reception of KPOA's standard band broadcasts outside the Territory is too

unreliable and irregular for such reception to have commercial value.

7. KPOA has a "foreign language department" which is offered by it as a service to advertisers. This department conducts, each broadcast day, a substantial number of hours of broadcasts in Japanese and in a Filipino dialect. These broadcasts are scheduled by the station each day on a participating basis, that is, the station puts on the foreign language programs and sponsors buy spot announcements on the programs.

8. A large number of KPOA time buyers have no desire or occasion to reach any audience outside the Territory, even if effective and satisfactory service were offered.

9. The radio audience outside the Territory of Hawaii is not a factor in the selling or buying of radio time on station KPOA, where no shortwave relay is employed.

10. The sale of radio time to Willie Saaga, shown by plaintiffs' Exhibit L, is an exceptional instance, and the Tax Commissioner was not obliged to take notice of this exceptional instance unless it was called to his attention. Before the tax assessments were made KPOA was given an opportunity to make such showing but did not do so and is not now entitled to a deduction for this sale.

11. The Territorial tax law has been and is properly interpreted and applied by the Tax Commissioner and the tax law and assessments made thereunder are valid.

12. The plaintiffs are not entitled to recover the taxes

paid under protest and the Tax Commissioner is entitled to judgment on his counterclaim.

In accordance with the foregoing the Court finds that the sum of $7,637.33 paid under protest by the complainants to the Tax Commissioner is a lawful government realization and that the complainants are not entitled to recover the same, and in addition thereto the Tax Commissioner, on behalf of the Territory, is entitled to recover of the complainants the further sum of $14,595.98 together with additional interest accrued from the first day of April, 1951, to and including the 31st day of January, 1952, in the amount of $96.98 for each month, or fraction thereof, and the costs herein incurred. A judgment in accordance herewith will be signed on presentation.

DATED at Honolulu, T. H., this 28th day of January, 1952.

WILLSON C. MOORE
Judge of the Above Entitled Court.

J. ELROY MCCAW and JOHN D. KEATING, Complainants herein, do hereby except to the foregoing Decision.

J. ELROY MCCAW and JOHN D. KEATING, *Complainants,*
By DAVID N. INGMAN, KENNETH DAVIS, JUSTIN MILLER and VINCENT T. WASILEWSKI, *Their Attorneys,*
By DAVID N. INGMAN

EXCEPTION ALLOWED this 28th day of January, 1952.

S/ WILLSON C. MOORE (Seal)
Judge of the Above Entitled Court.

I do hereby certify that the foregoing is a full, true and correct copy of the original on file in this office, in full force and effect this 17th day of April, 1952. AMY E. NUTTALL, *Clerk, Circuit Court, First Circuit, Territory of Hawaii.*